Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-1216

ANN HERNANDEZ, *Petitioner,*

vs.

DONALD DYE, et al., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. OPINIONS BELOW[1]

The decision about which petitioner complains is an unpublished opinion of the California Court of Appeal which may not be cited in any other case (Cal. Rules of Court, Rule 977). A hearing was denied by the California Supreme Court, but that denial was not a decision on the merits of the case. *DiGenova v. State Board of Education,* 57 Cal.2d 167, 178, 18 Cal.Rptr. 369, 367 P.2d 865 (1962).

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[1]Since petitioner has not adequately and correctly complied with Rule 23, and in an effort to aid the court, this brief in opposition adopts the format of a petition to supplement or correct information supplied by petitioner.

II. JURISDICTION

The opinion of the Court of Appeal was filed September 13, 1976, and became final on October 13, 1976. The California Supreme Court denied a hearing on November 12, 1976. The instant petition for certiorari was served on respondents by mail on February 8, 1977. Petitioner has not complied with Rule 21(3) with respect to advising respondents of the date this petition was filed.

Although petitioner is incorrect that this court has jurisdiction under 28 U.S.C. §1331, jurisdiction would be present under 42 U.S.C. §1257(3) except that the federal question presented is frivolous.

Petitioner has now filed an action in the Federal District Court for the Northern District of California based on the same facts as the instant case and entitled *Ann M. Hernandez v. Donald Dye, Felix Elizalde, Dr. Clement A. Long, Dr. Norvel Smith, Peralta Colleges, Peralta College Board of Trustees, Does I-X,* Action No. C-76-2921-RHS. The court may take judicial notice of that action.

III. QUESTION PRESENTED

There are no important constitutional issues in this case. Petitioner devotes most of her argument to the already well-established principle that public employees have a right to a hearing before termination. Respondents have never contested that principle and the California Education Code so provides.

The only issue presented is one of waiver and exhaustion of administrative remedies. That is, where petitioner attempted to avoid the established administrative hearing procedure provided, requested instead a hearing before another body, and then filed suit claiming denial of a hearing while that request was being considered, may that suit be dismissed?

IV. STATUTES

California Education Code §13583:

> The governing board of a school district shall prescribe written rules and regulations, governing the personnel management of the classified service, which shall be printed and made available to employees in the classified service, the public, and those concerned with the administration of this section, whereby such employees are designated as permanent employees of the district after serving a prescribed period of probation which shall not exceed one year.
>
> Any employee designated as a permanent employee shall be subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board, but the governing board's determination of the sufficiency of the cause for disciplinary action shall be conclusive.
>
> The governing board shall adopt rules of procedure for disciplinary proceedings which shall contain a provision for informing the employee by written notice of the specific charges against him, a statement of his right to a hearing on such charges, and the time within which such hearing

may be requested which shall be not less than five days after service of the notice to the employee, and a card or paper, the signing and filing of which shall constitute a demand for hearing, and a denial of all charges. The burden of proof shall remain with the governing board, and any rule or regulation to the contrary shall be void.

No disciplinary action shall be taken for any cause which arose prior to the employee's becoming permanent, nor for any cause which arose more than two years preceding the date of the filing of the notice of cause unless such cause was concealed or not disclosed by such employee when it could be reasonably assumed that the employee should have disclosed the facts to the employing district.

This section shall apply only to districts not incorporating the merit system as outlined in Article 5 (commencing with Section 13701) of this chapter.

California Education Code §13583.5:

A notice of disciplinary action shall contain a statement in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based, a statement of the cause for the action taken and, if it is claimed that an employee has violated a rule or regulation of the public school employer, such rule or regulation shall be set forth in said notice.

A notice of disciplinary action stating one or more causes or grounds for disciplinary action established by any rule, regulation, or statute in the language of the rule, regulation, or statute, is insufficient for any purpose.

A proceeding may be brought by, or on behalf of, the employee to restrain any further proceedings under any notice of disciplinary action violative of this provision.

This section shall apply to proceedings conducted under the provisions of Article 5 (commencing with Section 13701) of this chapter.

V. STATEMENT OF FACTS

After numerous meetings with supervisors failed to result in improvement of petitioner's employment deficiencies (CT 560:29-561:8; 199; 562; 566; 205; 206; 212; 568; 569; 216; 571), and after petitioner retained an attorney to threaten her supervisors (CT 362; 366; 369; 372), petitioner was notified in writing on February 16, 1973, that she was terminated effective March 2, 1973 (CT 585).

This notification gave seven specific reasons for the termination[2] and advised petitioner of her rights to review her personnel file, deny the charges, and request a hearing before the personnel review committee.

Instead of requesting such a hearing, petitioner requested that an executive personnel session of the Board of Trustees be convened on March 5 or March 19 to hear her story (CT 587). Petitioner's attorney

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[2]These do not include obscenity, contrary to petitioner's assertion at pages 8 and 9 of her petition.

also made that request and stated that if such a session could not be arranged, a hearing was demanded "after the said charges have been set forth specifically" (CT 589).

On March 5, petitioner was advised that her request for an executive personnel session with the Board had been transmitted to that body for consideration (CT 592).

However, on March 8, eleven days before the March 19 date suggested by petitioner for such a session, petitioner filed the instant lawsuit (CT 1-6). Named as defendants were her supervisors, the District and the Board of Trustees.

On March 14, petitioner was advised that since she had filed suit, her request for an executive session with the Board was deemed inappropriate (CT 593).

VI. ARGUMENT

Petitioner misstates both the issue and the evidence in this case. The record shows that petitioner was offered a hearing pursuant to Education Code §§13583, 13583.5 (CT 586). Instead of accepting that hearing, she requested a special meeting of the Board of Trustees to discuss her case (CT 587). While the defendants were arranging the Board of Trustees' executive session requested by petitioner and her attorney, petitioner filed the instant lawsuit (compare CT 592, and 1). Because the suit had been filed, the request for a Board meeting was denied (CT 593).

Petitioner should not now be heard to complain that she did not get the hearing which she prevented by filing this lawsuit. The question presented is not whether petitioner was denied due process rights by a technicality, as she would have this court believe, but whether she waived her right to a hearing by making unreasonable demands for special treatment and then filing suit while those demands were under consideration. *See, Bignall v. North Idaho College,* 538 F.2d 243 (9th Cir. 1976).[3]

Indeed, if for no other reason her suit was properly dismissed for failure to exhaust her administrative remedies before filing her lawsuit. *Toney v. Reagan,* 467 F.2d 953 (9th Cir. 1972), *cert. denied,* 409 U.S. 1130 (1973).

VII. CONCLUSION

Petitioner has no one but herself and her attorneys to blame for her troubles. Instead of accepting the offered hearing, she demanded special treatment and imposed unjustified conditions on her acceptance of a hearing. Then while the District was trying to accommodate her, she filed this action.

The action was properly dismissed on motion for summary judgment. But in any event, there are no

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[3]Although petitioner does not assert that she was dismissed for constitutionally impermissible reasons, and has not relied on 42 U.S.C. §1983 in this proceeding, the reasoning of the court in *Bignall* would also require dismissal of the instant case.

questions here of constitutional importance and no federal laws are at issue. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated, February 28, 1977.